United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-1030

To be argued by
ALBERT S. DABROWSKI

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1030

UNITED STATES OF AMERICA,
Appellee,

—v.—

WAYNE BROWN,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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STATUTE

Title 18, United States Code, Section 2113(a) 1, 2

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1030

UNITED STATES OF AMERICA,

Appellee,

—v.—

WAYNE BROWN,

Appellant.

BRIEF FOR THE APPELLEE

Statement of the Case

On September 17, 1976 a Federal Grand Jury sitting in Hartford, Connecticut, returned a one-count indictment charging Wayne Brown and Arlo Lewis with the armed robbery of the Windsor Branch of the United Bank and Trust Company, 494 Windsor Avenue, Windsor, Connecticut on July 10, 1976 in violation of Title 18, United States Code, Section 2113(a).

On September 24, 1976, both defendants entered pleas of not guilty before the Honorable M. Joseph Blumenfeld, United States District Judge. Trial by jury before Judge Blumenfeld commenced on November 16, 1976. Co-defendant Arlo Lewis testified as a government witness

at the trial under a grant of immunity.[1] On November 19, 1976, after deliberating for two (2) hours and sixteen (16) minutes, the jury returned a verdict of guilty. On January 3, 1977, Judge Blumenfeld sentenced Brown to an eight (8) year term of imprisonment. The appellant is presently incarcerated.

Statute Involved

Title 18, United States Code, Section 2113:

Bank Robbery and incidental crimes

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or * * *
>
> Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

Questions Presented

1. Was the trial court's admission of proof of Brown's possession of a .38 caliber revolver two days after the bank robbery reversible error?

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[1] The case against Arlo Lewis was served from that against Wayne Brown. Lewis entered a plea of guilty to a substitute information charging him with a violation of Title 18, United States Code, Section 2113(b) while reserving the right to appeal and adverse ruling on his motion to suppress written and oral admissions made by him to local and federal officers. On January 3, 1977, Judge Blumenfeld sentenced Lewis to a three (3) year term of imprisonment. Lewis' apeal is pending before this Court. (*United States* v. *Arlo Lewis*, Docket No. 77-1031).

2. Was the trial court's admission of proof of Brown's possession of Five Hundred and Three Dollars two days after the bank robbery reversible error?

Statement of Facts

On July 10, 1976, at approximately 10:58 a.m., two black males, one of whom brandished a handgun, entered and robbed the United Bank and Trust Company in Windsor, Connecticut of Two Thousand One Hundred Forty-seven Dollars ($2,147.00). Five Hundred Dollars of the amount taken was listed as bait money. During the course of the robbery the individual with the gun shouted orders to the three bank employees and six customers then in the bank such as "Don't anybody move" and "Hit the floor, bitch." (Tr. at 15, 51).* The second robber vaulted the counter and removed money from three tellers' drawers thereby activating two surveillance cameras. The resulting film was introduced in evidence as Government Exhibit 23.** In addition, the government introduced a print of each frame of the film and enlarged photographs of four selected frames. (Exhibits 27, 29 and 30).[1]

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* References marked Tr. refer to trial transcript.

** References to Exhibits refer to Government Trial Exhibits.

[1] The bank surveillance film (Super 8) was shown to the jury. The appellant describes the bank surveillance film and the photographs as "far from clear" and "blurry", respectively. (Brief for appellant at 4). There is no question that the film as projected during the trial was "far from clear." However, the photographic blowups were not "blurry" enough to preclude Cecil Hawkes, Brown's building superintendent, Willie Wright, a personal friend of Brown, and co-defendant Arlo Lewis from stating that the photograph depicted an individual who looked like Brown. (Tr. at 235, 266, 278, and 355-56). The only individual who testified that the gunman didn't look like Brown was

[Footnote continued on following page]

On July 17, 1976 Arlo Lewis was arrested by Windsor Police Detective Larry Overstrom and Federal Bureau of Investigation Special Agents Harry Willis and David Miller on the basis of a state arrest warrant for the above bank robbery. Following his arrest Lewis admitted participating in the robbery and identified Wayne Brown as the gunman. Lewis testified against Brown under a grant of immunity.

Lewis testified that he had known Wayne Brown for six or seven years. (Tr. at 341). He testified that on the afternoon of July 9, 1976, the day prior to the bank robbery, while he and Brown were "boosting" (shoplifting), Brown suggested they "get some real money" and "do a bank robbery." (Tr at 348, 364). Lewis stated that there was no agreement to rob a bank on July 9, 1976, however, he and Brown did go into a few banks, including the one they robbed the next day, to "look at them." (Tr. at 364-65).

Lewis testified that on the morning of July 10, 1976 Brown came over to his house at which time they decided to do some more "boosting." Lewis and Brown then went to Brown's house to pick up extra clothing.[2] Lewis

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his employer, Joseph Kobylarz. (Tr. at 460-61). Kobylarz's then added "Although *I'm sure it does*—no way can I say it is him. . . ." (Emphasis added). In addition, the appellant states that the film did not record any pictures of the second robber. (Brief for Appellant at 4). The second robber is clearly depicted in the film vaulting the counter with the black briefcase in his hand. (Tr. at 71, Exhibits 23, 29 and 30).

[2] The extra clothing was originally to be used in connection with the shoplifting. Lewis testified:

> Q. But you obtained some extra clothing for yourself?
> A. Yes.
> The Court: Why? What was that for?
> The Witness: I usually—like when I go out boosting,

[Footnote continued on following page]

stated they then drove to the Windsor Shopping Mall and parked behind the United Bank and Trust Company in Brown's green Camaro. (Tr. at 346-47). Lewis testified that he and Brown entered the bank to take "a look at it." (Tr. at 346). Once inside Brown pulled a handgun out of a briefcase he was carrying and handed the empty briefcase to Lewis. While Lewis claimed he didn't intend to rob the bank when he entered it, he "instinctively" grabbed the briefcase, vaulted the counter and filled it with money. (Tr. at 347, 368).

Following the robbery Lewis and Brown ran to Brown's Camaro, and drove up a hill, across a street, past a guard and into a "big parking lot." (Tr. at 351).[3] After several minutes of driving around in the parking lot they realized that the only way out was past the guard at the main entrance. Thinking that by that time the guard would have been advised of the bank robbery they decided to abandon the car. (Tr. at 352). Brown then parked the car and ran into the woods behind the Stanadyne Corporation carrying the briefcase containing the money taken from the bank. Lewis followed carrying a second briefcase containing the extra clothes they had picked up at Brown's house. (Tr. at 352). Once in the woods they changed clothes. Lewis testified that Brown took the money and told him he would meet him later. (Tr. at 355). The two then left the woods leaving the briefcases and clothes behind. Lewis never saw Brown again.

I usually like to bring another set of clothes. In case I decide to go back into the same store, I don't want to be wearing the same thing that I had on.

The Court: When you say "boosting," what are you talking about? Shoplifting?

The Witness: Shoplifting, yes. (Tr. at 348).

[3] Brown and Lewis actually drove into the parking lot of the Stanadyne Corporation located approximately four-tenths of a mile from the bank. (Tr. at 183-84).

As more fully set out below a number of items were recovered incident to a search of Brown's Camaro (Exhibits 1-10) and the woods behind the Stanadyne Corporation (Exhibits 11-20). At the trial Lewis identified the briefcase used during the robbery (Exhibit 12, Tr. at 349). He also identified items of clothing worn by Brown in the bank, including, a blue denim hat (Exhibit 2, Tr. at 359), tan pants (Exhibit 15, Tr. at 360), a shirt (Exhibit 20, Tr. at 362) and a tie (Exhibit 13, at 360). He identified pants (Exhibit 16, Tr. at 360), a shirt (Exhibit 14, Tr. at 360) and a tie (Exhibit 3, Tr. at 361) as items of clothing worn by himself while in the bank.

Evidence was introduced at trial that on July 12, 1976 a 1970 Green Chevrolet Camaro bearing Connecticut Registration TF 4738 was discovered abandoned next to a building at the Stanadyne Corporation, Windsor, Connecticut. It was stipulated at trial that this vehicle was registered to the defendant, Wayne Brown, and had been purchased by him on June 15, 1976. (Tr. at 157). Gerry Nunes, an employee of the Stanadyne Corporation, testified that he saw this Camaro parked behind the United Bank and Trust Company a few minutes after punching out from work at 10:55 a.m. on July 10, 1976. (Tr. at 144, 147). A number of items taken from this vehicle incident to a search conducted on July 12, 1976, including, but not limited to, a blue denim hat (Exhibit 2), a tie (Exhibit 3), three briefcases (Exhibits 4-6) and a cancelled bankbook in the name of Wayne Brown (Exhibit 10a), were introduced into evidence at trial. Two bank employees and one customer positively identified Exhibit 2 as the blue denim hat worn by the gunman. (Tr. at 54, 90, 117). Two other customers testified that Exhibit 2 was similar to the hat worn by one of the robbers. (Tr. at 20, 110). A bank teller identified Exhibit 3 as a tie worn by one of the robbers. (Tr. at 91).

Joyce Allen, one of Brown's former girlfriends, testified that she had seen Brown carrying Exhibit 6, a briefcase, prior to the robbery.

Also introduced at trial were a number of items found in the woods behind the Stanadyne Corporation including, but not limited to, two briefcases (Exhibits 11-12), a tie (Exhibit 13), two pairs of pants (Exhibits 15-16), two shirts (Exhibit 14-20), and $500 and $100 money wrappers (Exhibits 18-19). Joyce Allen and Linda Hall, both girlfriends' of Brown, testified that Brown had "a whole lot of briefcases" and they thought Exhibit 11 was one they had previously seen. (Tr. at 313 and 323). Three bank employees identified Exhibit 12, a black briefcase, as the briefcase used in the bank robbery. (Tr. at 22, 54, 61 and 90). Two bank employees identified Exhibit 14, a shirt, as one worn during the robbery. (Tr. at 21, 92 and 98). It was also established that the two money wrappers found with the clothing in the woods came from the United Bank and Trust Company. (Tr. at 25-26, 73). Linda Hall, while not absolutely certain, thought she had seen Brown wearing Exhibit 15, a pair of brown pants, prior the robbery. (Tr. at 322 and 325). Those pants contained a laundry tag number "0954." Fernanda Pereira, the owner of New Park Cleaners, a laundry located near Brown's place of employment, testified that Brown, a good customer, was the person who brought the pants into her shop on June 29, 1976. (Exhibit 26, Tr. at 211 and 217).

During the trial two bank employees and three customers testified that Brown resembled one of the robbers.[4] A third employee, Mae Johnson, was unable to

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[4] The appellant claims that no witness identified Brown as one of the robbers. (Brief for Appellant at 20). Joseph Lupacchino, the bank manager, testified that Brown was "similar"

[Footnote continued on following page]

make any in-court identification because the gunman was wearing a hat, had sunglasses and a mustache. (Tr. at 25).[5]

There was also evidence that immediately prior to the bank robbery Brown did not have any money. Cecil Hawkes, the superintendent of the building housing Brown's apartment, testified that in June and July of 1976 Brown told him he had just bought a car and could not pay the rent for several weeks. (Tr. at 225-27). Willie Wright, a personal friend of Brown, testified that on July 8, 1976 Brown told him that he owed people money. (Tr. at 277). Wright also testified that he and Brown took a bus to New York on July 10, 1976, departing Hartford at approximately 12:30 p.m. (Tr. at 286). On March 15, 1976 Brown closed his savings account at the State Bank for Savings with a withdrawal of $198.01 (Exhibit 10a). Joseph Kobylarz, Brown's employer, described him as conscientious and a good worker. (Tr. at 458). However, he stated that Brown, who always carried a briefcase, did not return to work, as scheduled, on July 12, 1976. (Tr. at 462-63).

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to the gunman. (Tr. at 63). He was certain Brown was not the robber who vaulted the counter. (Tr. at 76). Linda Depascale, a bank teller, referring to Brown, stated "I can't say that he is. I can't say that he isn't . . . I can't be positive that he is." (Tr. at 94). Lawrence Novella, a customer, stated that Brown "might be him." (Tr. at 116). Rita Henry and Frances Sullivan, both of whom were outside the bank and saw the robbers leave, picked out Brown as resembling one of the robbers but stated they "couldn't be sure." (Tr. at 134, 482).

[5] When asked if either one of the robbers was in the Courtroom during the trial Mae Johnson responded "I couldn't be sure" and "No, not positively." (Tr. at 24 and 25). Her explanation was that "the person that was holding the gun was wearing the hat and the sun glasses and had a mustache." Since Mrs. Johnson had an opportunity to observe both bank robbers (Tr. at 28) it is apparent that she had eliminated Brown as the individual who vaulted the counted.

On July 12, 1976, two days after the bank robbery, Brown was arrested at LaGuardia Airport, Queens, New York after an X-ray machine revealed a weapon in a briefcase he was carrying. This weapon, a .38 caliber revolver, with a two-inch barrel, was introduced in evidence (Exhibit 21). Bank tellers Johnson and Depascale and bank customer Novella testified that the gun introduced into evidence "looked like" the weapon held by the gunman. (Tr. at 22, 92 and 117-118). Prior to seeing the gun bank manager Lupacchino accurately described the weapon held by the gunman as a "revolver, blue/black metallic . . . (with) a two inch barrel." (Tr. at 56). Lupacchino, who was within a few feet of the gunman, who saw bullets in the gun's chambers and who demonstrated a degree of familiarity with handguns, stated he believed the gun was a .38 caliber. (Tr. at 56, 58 and 81). After Lupacchino was shown Exhibit 21 in Court he testified that it looked like the gun used during the robbery. (Tr. at 58). Co-defendant Arlo Lewis testified that the gun used by Brown during the robbery "looks just like that one (Exhibit 21)." (Tr. at 363).

The .38 caliber revolver was taken from Brown at LaGuardia Airport by Port Authority police officer Clifford Barry. Barry testified that Brown told him he had bought the gun in New York and had had it for two years. (Tr. at 408). Barry also testified that on July 12, 1976 Brown had $503 in cash on his person, had purchased a plane ticket and had a "brand new suit" which he said he had just purchased. (Tr. at 403-04). Furthermore, Brown identified himself to Barry as "Willie Wright." (Tr. at 402).[6]

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[6] Brown was also arrested for possession of hypodermic needles, cocaine and heroin. However, evidence of his possession of these narcotics was not introduced at trial.

I.

The trial court properly admitted proof of Brown's possession of a .38 caliber revolver two days after the bank robbery.

Wayne Brown appeals from a judgment of conviction in the United States District Court for the District of Connecticut on November 19, 1976 before the Honorable M. Joseph Blumenfeld, United States District Judge and a jury. Brown asserts that the trial court committed reversible error in admitting proof of his possession of a .38 caliber revolver of the kind used during bank robbery two days after the commission of the offense. The question before this Court is whether Judge Blumenfeld abused his discretion in making the determinaton that the probative value of this evidence was not substantially outweighted by the danger of unfair prejudice. In support of his argument that the trial court committed reversible error the appellant states that the case at bar "is not unlike, *United States* v. *Robinson*, 544 F.2d 611 (2d Cir. 1976), *petition for rehearing en banc granted*, February 17, 1977, or *Walker* v. *United States*, 490 F.2d 683 (8th Cir. 1974) where the words 'less than an airtight case' could characterize the evidence." Brief for Appellant at 19-20, citations modified. As more fully discussed hereafter the facts of the present case differ considerably from those in *Robinson*, a case in which this Court recently granted reconsideration *en banc*, and *Walker*, where the gun subsequently found on the defendant was definitely not the weapon used in the robbery.

Relevance

The appellant concedes that Officer Clifford Barry's testimony that he possessed a .38 caliber revolver on July 12, 1976 is relevant. Indeed, in view of a similar conces-

sion in *United States* v. *Robinson, supra,* 544 F.2d at 615, the case upon which he relies, his decision to concede was not difficult. However, the appellant, in his brief, treats the relevancy of Officer Barry's testimony as though it were limited to the inference that the weapon he possessed (in a briefcase) on July 12 was the same weapon he took out of a briefcase during the bank robbery on July 10. But even if the weapon found on the defendant's person was not the weapon used during the robbery, the possession of a similar weapon is proof of access to the implements used in the crime, and, therefore, is circumstantial evidence of preparation and ability to commit the offense. *See, e.g., United States* v. *Wiener,* 534 F.2d 15 (2d Cir. 1976), *United States* v. *Ravich,* 421 F.2d 1196, 1204 (2d Cir.), *cert. denied,* 400 U.S. 834 (1970), *United States* v. *Baker,* 419 F.2d 83 (2d Cir. 1969), *cert. denied,* 397 U.S. 976 (1970).[7]

Probative Value

Under Rule 403 of the Federal Rules of Evidence, evidence, although relevant, may be excluded "if its probative value is substantially outweighted by the danger of unfair prejudice. . . ." The appellant asserts that the probative value of the evidence of his possession of a .38 caliber handgun must, like the evidence in *Robinson, supra* at 618, be characterized as "slight" since the two cases are factually similar. Any similarity between this case and *Robinson* ends with the fact that neither Brown nor Robinson, both of whom were regularly employed, worked

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[7] If it was clear that the gun found on the defendant was not the gun used to commit the offense, the evidence of possession, although relevant, would probably, but not necessarily, be excluded on the basis that the danger of unfair prejudice substantially outweighed its probative value. *See Walker* v. *United States, supra,* 490 F.2d 683.

on the days of the bank robberies. In *Robinson, supra,* 544 F.2d at 620, the Court took into account the fact that the first trial judge excluded evidence of the weapon as prejudicial and

> . . . the three days of jury deliberations and two *Allen*-type charges required to produce a verdict of guilty, and the fact that a jury had previously hung in the absence of admission of the gun.

In the case at bar the jury deliberated for two hours and sixteen minutes and Judge Blumenfeld, after reading the *Robinson* decision, admitted the evidence. (Tr. at 394, 530).[8] The *Robinson* Court also noted that the government's case rested "primarily, if not solely," on Allen Simon, a co-defendant who initially denied Robinson was involved. There was ample evidence in this case, in addition to the testimony of co-defendant Arlo Lewis, who never denied that Brown was involved, to convict Brown for bank robbery.[9] The individual Simon identified as

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[8] While the majority opinion in *Robinson* assumed that the admission of the gun a tthe second trial was critical to the conviction there were other significant differences which could have accounted for the difference. (*See United States* v. *Robinson,* Brief for United States on Rehearing *en banc* at 14 (Docket No. 76-1153).

[9] Judge Blumenfeld compared the facts of *Robinson* to the facts of the case he was then presiding over and stated "But we have more here; a lot more." (Tr. at 395). In addition, appellant characterizes codefendant Arlo Lewis as an "individual who testified in contradiction to statements he previously made to the FBI." (Brief for Appellant at 20). At the trial Lewis testified that he was not absolutely certain whether the bank he and Brown robbed on July 10, 1976 was one of the banks they cased on July 9, 1976. He also testified that the first time he saw the gun was when Brown pulled it out of a briefcase in the bank. (Tr. at 309-310). Lewis told the FBI that they went into the same bank on the day before the robbery

[Footnote continued on following page]

Robinson in the bank surveillance photographs was not holding a gun whereas the individual Lewis identified as Brown was holding a handgun. *United States* v. *Robinson, supra,* 544 at 614. The getaway car in *Robinson,* belonged to Otis Brown, not Robinson, while the getaway car in the case at bar was owned by the defendant Brown himself. (*Id.* at 613). The .38 caliber handgun was found on defendant Robinson *ten* weeks after a bank robbery in which several weapons were used and a teller was injured as a result of a bullet wound from a .32 caliber weapon. (*Id.*). The .38 caliber revolver was found in a briefcase belonging to Brown *two days* after a bank robbery during which the gunman drew a weapon from a briefcase.

The *Robinson* majority, *citing United States* v. *Eatherton,* 519 F.2d 603, 611-12 (1st Cir.), *cert. denied,* 423 U.S. 987 (1975), also noted that Robinson, at the time of his arrest, was not in possession of "inherently suspicious" items such as "masks." Brown not only had a .38 caliber weapon, possessed a large amount of money (by his prior standards), a new suit, a plane ticket, and gave a false name when asked to identify himself, but a ski mask was found in the trunk of his car. (Exhibit 7).

In view of the independent evidence of Brown's participation in the bank robbery, the testimony of Arlo Lewis that the gun "looks just like that one," the testi-

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and that he saw the gun before going into the bank. These are the only inconsistencies in fifty-five pages of testimony (Tr. at 332-387) which have been pointed out by the appellant. Indeed, an analysis of Lewis' testimony clearly demonstrates that virtually all his testimony was corroborated by independent evidence. It is obvious that the jury did not believe that Lewis' trial testimony "substantially differed" from his prior statements to the FBI. (Brief for Appellant at 9).

mony of bank manager Lupacchino that the gun taken from a briefcase and used in the bank robbery was a .38 caliber revolver with a two inch snub-nose barrel, and that two days later Brown possessed .38 caliber revolver with a two inch snub-nose barrel in a briefcase, the inference that the guns were identical was inescapable. As Judge Mansfield stated in his dissent to the *Robinson* majority's opinion:

> "While handguns may be all too plentiful in our society, the majority would imply that they are as common as subway tokens. In fact, the vast majority of people do not possess a handgun, much less one of .38 caliber *To find such a gun in the possession of the very person against whom there is independent proof that he used a .38 caliber handgun in the bank robbery is sufficiently coincidental to be extraordinary.* I cannot agree with the majority that this evidence 'established only a very weak inference that appellant was one of the bank robbers.' On the contrary, while there is always the outside possibility that the gun might have been acquired by him after the robbery, the strong probability is that, absent any evidence that it came from some intervening source, the gun had been in his possession and used by him in the bank robbery." (*Id.* at 622) (Emphasis added).

In light of the particular circumstances of this case, it is submitted that Brown's possession of a .38 caliber revolver two days after the robbery was sufficiently coincidental to be extraordinary and had considerable probative value.

Prejudicial Effect

There is no question that evidence of Brown's possession of a .38 caliber handgun, like most of the evidence presented against him during the government's case-in-chief, was prejudicial to the defendant.[10] However, Rule 403 of the Federal Rules of Evidence dictates the exclusion of relevant evidence only after the trial court has determined that the probative value of the evidence is substantially outweighted by the danger of *unfair prejudice.* In view of the factual circumstances of this case, and the limiting instruction given by Judge Blumenfeld immediately following the introduction of the gun, the possibility that the jury drew improper inferences from the introduction of the handgun is slight.[11]

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[10] Judge Blumenfeld, commenting on the prejudicial nature of evidence of the weapon, stated: "if you are caught with evidence that's harmful, that's unfair, you might say, and prejudicial. But that doesn't mean it is objectionable." (Tr. at 397).

[11] Judge Blumenfeld, despite the lack of any request for a cautionary instruction, immediately advised the jury as follows:

> The gun is offered as evidence to prove that Wayne Brown, at the time of the robbery, used a gun in the course of committing the robbery.
>
> Now, this was found in his possession very shortly after the robbery took place. There is evidence that he did go to New York following the robbery.
>
> I'm not indicating to you what evidence you should believe or credit, but there is evidence also, from others, that this looks like the gun that he was using at the time, or that was being used at the time of the robbery.
>
> So you may consider whether or not this is the gun that he used.
>
> On the other hand, or in the same connection, the mere fact that he had a gun in his possession, if you are not satisfied that this is the gun that he used, is not to be considered as evidence that he was a bad man because he had a gun in his possession in New York. The only question is whether this was the gun that he had at the time of the robbery.

[Footnote continued on following page]

As Judge Mansfield stated in his dissent in *Robinson*, *supra*, 544 F.2d at 623:

> It denigrates the common sense of the average jury to suggest that simply because of a defendant's later possession of a hand gun a jury would find him guilty of an earlier bank robbery. A jury is quite capable of distinguishing between the crime of bank robbery and that of possible violation of New York's Sullivan Law. . . . the jury is not going to convict the defendant of robbery merely because he may have possessed a hand gun ten weeks after the robbery was committed. Jurors hardly expect evidence in a bank robbery case to be limited to the discreet and delicate niceties that might characterize a highly technical civil suit.

Reversible Error

In the final analysis Brown asserts that Judge Blumenfeld's evidentiary ruling admitting proof of Brown's possession of a handgun, similar, if not identical, to the handgun used during a bank robbery two days earlier, constituted a clear abuse of discretion. Judge Blumenfeld, an experienced trial judge, admitted this evidence only after carefully weighing its probative value against its prejudicial effect. Moreover, the Court admitted this

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> If you decide it wasn't, then not only is that something you are not going to regard, but you cannot take it into account and say, well, even if that isn't the gun it shows he's a bad man. Because we are not here to try the case of whether he's a bad man or whether he's done something else that he shouldn't have been doing.
>
> The only case we are concerned with is the case of the bank robbery which occurred on July 10th in the Town of Windsor.
>
> Anything else? (Tr. at 405-406).

evidence at trial with full knowledge of the *Robinson* decision. This Court's review on appeal involves an exercise of discretion by a trial judge who has "a feel for the effect of the introduction of this type of evidence that an appellate court, working from a written record, simply cannot obtain," *United States* v. *Leonard*, 524 F.2d 1076, 1092 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976), and whose decision will rarely be reversed on appeal. *United States* v. *Cheung Kin Ping*, Docket Nos. 76-1362, 76-1368, Slip Op. at 2071 (2d Cir. February 28, 1977).

In urging this Court to conclude that Judge Blumenfeld erroneously balanced the prejudicial effect of the introduction of the weapon against its probative value the appellant relies exclusively on *Robinson* and *Walker*. In *Walker*, *supra*, 490 F.2d at 684, the Court stated:

> This is not at all the classic case of admitting into evidence a "similar" weapon which was found in the possession of a defendant but which could not be positively identified as that used in a crime. Such evidence has been regularly admitted as relevant. *E.g.*, *Banning* v. *United States*, 130 F.2d 330, 335 (6th Cir. 1942); *United States* v. *Cunningham*, 423 F.2d 1269, 1276 (4th Cir. 1970). Here there was positive evidence that the pistol admitted was *not* similar to the one used in the crime. Thus the traditional justification for the admission of such a weapon is cut away and the evidence must be seen as irrelevant since it was not probative of the proposition that the accused committed the crime charged. (Footnote omitted).

It is respectfully submitted that the case at bar is that "classic case" referred to in *Walker*.

Robinson, while certainly the most recent, is not the only case in this Circuit dealing with the process of bal-

ancing the probative value of gun evidence against its prejudicial effect. In *United States* v. *Wiener*, 534 F.2d 15 (2d Cir. 1976), the Court found no error in the introduction into evidence of a loaded gun, found at the time of the defendant's arrest on narcotics charges, even though there was no evidence that a gun was involved in prior drug negotiations. In *United States* v. *Campanile*, 516 F.2d 288 (2d Cir. 1975), the Court affirmed a bank robbery conviction where evidence of the seizure of a pistol was introduced at trial even though the bank robbery had been committed at night without the apparent use of any weapons at all. In *United States* v. *Johnson*, 401 F.2d 746 (2d Cir. 1968), the trial court admitted in evidence a gun found in the defendant's apartment even though the bank teller involved could not positively testify that the weapon introduced in evidence was the weapon used during the robbery. In affirming the conviction this Court stated:

> The teller testified that the gun looked like the gun which the robber had pointed at her. The evidence was relevant; it can hardly be said in a case where a gun is used in a hold-up that the gun, identified as well as was possible under the circumstances, is too prejudicial to be considered by the jury. *Id.* at 747-48.

In *United States* v. *Ravich*, 421 F.2d 1196 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970), the trial court admitted into evidence six guns, at least three of which could not have been used during the bank robbery involved in that case. This Court, holding that such evidence was properly admitted, stated:

> "The evidence connecting the guns seized in Louisian with those used in the robbery was rather attenuated. Indeed, since only three guns were used in the robbery it is perfectly plain that at least half of the profferred weapons were not used there.

> Nevertheless, a jury could infer from the possession of a large number of guns at the date of arrest that at least some of them had been possessed for a substantial period of time, and therefore that the defendants had possessed guns on and before the date of the robbery." *Id.* at 1204.

In an attempt to avoid the holding of the *Ravich* decision, appellant characterizes his case as "less than airtight" and, therefore, "much unlike" *Ravich*. (Brief for Appellant at 15, 20). However, this approach ignores the suggestion in *Ravich* that the trial court might well have *excluded* evidence of the weapons "in view of the overwhelming evidence that the defendants were the robbers." *United States* v. *Ravich*, *supra*, 421 F.2d at 1204. In Ravich, the Court hinged its decision on the fact that "the trial judge has wide discretion in this area," not on the overwhelming nature of the case. *Id.* at 1205.

In *United States* v. *Fisher*, 455 F.2d 1101, 1104 (2d Cir. 1972) this Court stated:

> . . . possession of weapons at the scene of the crime and subsequent to the crime was relevant at least to show preparation for the crime and to corroborate the testimony of a key government witness. *See United States* v. *Ravich*, *supra*, 421 F.2d at 1204. To be sure all of this money and hardware was potentially unfairly prejudicial. But if relevant the task of weighing possible unfar prejudce against the probative value rests with the sound discretion of the trial judge, and "his determination will rarely be disturbed on appeal." *United States* v. *Ravich*, *supra*, 421 F.2d at 1205. The trial record amply demonstrates that Judge Judd considered the dangers of admitting this evidence, and, in light of the record, we are not persuaded that his decisions should be reversed. (Footnote omitted).

In the case at bar the record clearly demonstrates that Judge Blumenfeld gave ample consideration to the dangers of admitting proof of Brown's possession of the handgun. The trial court admitted this evidence only after it carefully weighted its probative value against any possible prejudicial effect. Moreover, the trial court, without a request from the defendant, gave a clear and proper cautionary instruction. Brown's claim that this ruling amounted to a clear abuse of discretion is without merit.

II.

The trial court properly admitted proof of Brown's possession of Five Hundred and Three Dollars two days after the bank robbery.

The appellant asserts that Officer Barry's testimony that he possessed $503 in cash two days after the bank robbery was not relevant to any issue at trial, and, therefore, such testimony was improperly admitted in evidence. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, Federal Rules of Evidence. The "degree of relevancy required for admissibility is one that generally is determined in the discretion of the trial court . . ." *United States* v. *Catalano*, 491 F.2d 268, 273 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974). Although such evidence is admissible under Rule 402 unless otherwise protvided by law, relevant evidence may be excluded under Rule 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The relevance of Brown's possession of $503 in cash must be measured against other evidence in the case. Not only did Brown possess the cash but he purchased a new suit, financed a trip to New York, stayed in New York for two days, and bought an Eastern Airlines ticket to South Carolina. More importantly he was able to expend these funds and have $503 left over despite being unable to pay his rent or his friends whom he owed money.[12] The money did not come from his bank account since that had been closedin March with a withdrawal of $198.01. (Exhibit 10a).

While conceding that possession of large amounts of money, *United States* v. *Fisher*, 455 F.2d 1101, 1103 (2d Cir. 1972) ($5,261.00), and *United States* v. *Yates*, 362 F.2d 578, 579 (10th Cir. 1966) ($8,700.00), would be relevant in a robbery trial, Brown claims that $503 was simply not enough money to be considered significant. In *United States* v. *Trudo*, 449 F.2d 649, 651 (2d Cir. 1971), this Court found a defendant's purchase of a used car for $500, a $100 gift to a girlfriend, and a $70 payment to have a road plowed, all during a period of several weeks after a bank robbery, to be "abundant evidence of sudden acquisition of wealth" which was "properly admitted" even though the defendant was regularly employed and had recently received an insurance check for $542.44.

It is well settled that the sudden, unexplained acquisition of wealth is admissible evidence supporting proof of

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[12] The appellant attempts to reduce the significance of Brown's inability to pay his rent prior to the bank robbery by noting that Cecil Hawkes had "many conversations" with Brown concerning the rent "implying that late payment of rent was not a problem confining itself to July." (Brief for Appellant at 11). However, Hawkes specifically stated that these conversations occurred in June and July of 1976. (Tr. at 225).

guilt in crimes involving motive for enrichment. Although relevant to the probative value and weight of the evidence, proof of prior impecuniousness is not a prerequisite for admissibility. The admission of this type of evidence is within the sound discretion of the District Court. *United States* v. *Jackskion*, 102 F.2d 683 (2d Cir.), *cert. denied*, 307 U.S. 635 (1939). See *United States* v. *Jenkins*, 496 F.2d 57, 66 (2d Cir. 1974); *United States* v. *Fisher*, *supra*, 455 F.2d at 1103; *United States* v. *Ravich*, *supra*, 421 F.2d at 1203; *United States* v. *Crisp*, 435 F.2d 354, 360 (7th Cir. 1970); *United States* v. *Brewer*, 427 F.2d 409, 411-12 (10th Cir. 1970).

Judge Blumenfeld's evidentiary ruling admitting this evidence was proper. It certainly was not a clear abuse of discretion. The danger of unfair prejudice, if any, was slight. There is absolutely no evidence on the record to indicate its admission resulted in confusion of the issues or was misleading to the jury. Similarly, there is no indication that the ruling resulted in undue delay or involved needless presentation of cumulative evidence. Brown's contention that the introduction of this evidence was reversible error is without merit.

CONCLUSION

The government, for the reasons submitted, respectfully urges that the judgment of conviction be affirmed.

Respectfully submitted,

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★ U. S. Government Printing Office 1977— 714--020—205

United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 77-1030

U S A,
APPELLEE,

v.

WAYNE BROWN,
APPELLANT

AFFIDAVIT OF SERVICE BY MAIL

Patricia D. O'Hara, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 51 West 70th Street, New York, New York 10023

That on the 28th day of March, 1977 deponent served the within Brief upon Daniel Kennedy, Esq., 10 Ellsworth Road, West Hartford, CT. 06107

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Patricia D. O'Hara

Sworn to before me,

This 28th day of March, 1977

Edward A. Quimby

EDWARD A. QUIMBY
Notary Public, State of New York
No. 24-3183500
Qualified in Kings County
Commission Expires March 30, 1977